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No. 91-1869

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In the Supreme Court of the United States

OCTOBER TERM, 1992

PRODUCTION PLATED PLASTICS, INC., ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, under the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. 6901 *et seq.*, a corporate officer who was directly and personally involved in activities that violated RCRA may be held liable in his individual capacity as an "operator" of a hazardous waste facility owned by the corporation.

2. Whether the district court correctly granted summary judgment holding the individual petitioner jointly and severally liable with petitioner corporations to accomplish the safe and lawful closure of the unlicensed hazardous waste facility at issue.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A46-A48) is unreported, but the decision is noted at 955 F.2d 45 (Table). The decisions of the district court (Pet. App. A1-A16, A18-A39) are reported at 742 F. Supp. 956 and 762 F. Supp. 722.

JURISDICTION

The judgment of the court of appeals was entered on February 20, 1992. The petition for a writ of certiorari was filed on May 20, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This is an enforcement action brought by the United States, on behalf of the Environmental Protection Agency (EPA), and the Michigan Department of Natural Resources (MDNR) for relief from violations of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. 6901 *et seq.*, and the Michigan Hazardous Waste Management Act (HWMA), Mich. Comp. Laws Ann. § 299.548 (West 1984).[1] The violations occurred at a hazardous waste facility in Richland, Michigan. Petitioners are Production Plated Plastics, Inc. (PPP), a Michigan corporation that molded, electroplated, and painted plastic automobile parts at the Richland facility; Michigan City Plastics Co. (MCP), an Indiana corporation that owns all of PPP's stock; and Michael J. Ladney, who owns 68% of MCP's stock and has at all relevant times served as president of both PPP and MCP. Pet. 3; Pet. App. A13-A14.

The district court granted partial summary judgment holding petitioners jointly and severally liable for several violations of RCRA. Pet. App. A1-A17. It later granted partial summary judgment on issues concerning appropriate relief. *Id.* at A18-A41. Ultimately, the district court entered a permanent injunction requiring petitioners to close the Richland facility in accordance with closure plans approved by MDNR. *Id.* at A42-A45. The court of appeals affirmed in all respects. *Id.* at A46-A48.

1. RCRA established a comprehensive federal program governing the generation, transportation, stor-

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[1] As the district court observed, "HWMA was designed to track RCRA and is the state law equivalent of RCRA." Pet. App. A23. Hereafter, we refer to the statutes collectively as "RCRA."

age, treatment, and disposal of hazardous wastes, in order to "to minimize the present and future threat to human health and the environment." 42 U.S.C. 6902(b). Section 3005 of RCRA, 42 U.S.C. 6925, requires that every hazardous waste facility have a permit to operate. Recognizing that EPA could not issue permits to all applicants before the effective date of RCRA, Congress provided that facilities in existence on November 19, 1980, could obtain "interim status," allowing them to operate until final action was taken on their permit applications. 42 U.S.C. 6925(e). Interim status was automatically granted to any facility that filed a "Part A" permit application, and allowed such a facility to continue operating until EPA took final action on the facility's subsequent "Part B" permit application. *Ibid.*; see Pet. App. A6-A7, A20-A21; see also *Northside Sanitary Landfill, Inc.* v. *Thomas*, 804 F.2d 371, 373-374 (7th Cir. 1986).[2]

In August 1980, petitioners submitted a "Notification of Hazardous Waste Activities" and a Part A permit application to EPA, thereby securing interim status. Pet. App. A3, A24. These submissions "identified 5,955 tons of listed hazardous waste in surface impoundments and a waste pile at the Richland facility." *Id.* at A24. Petitioner Ladney signed the Part A permit application and identified himself as the owner and operator of the Richland facility. *Id.* at A3, A4. Similarly, in the Notification he identified himself as the facility's "legal owner." *Id.* at A3.

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[2] The Part B application called for more detailed information than the Part A application, including closure and post-closure plans, a groundwater monitoring plan, and financial responsibility information. See 40 C.F.R. 270.13 (Part A permit requirements), 270.14-270.26 (Part B permit requirements).

More than four years later, however, petitioners submitted a revised Part A permit application that listed petitioner PPP as the owner of the Richland facility. *Id.* at A4.

2. In 1984, responding to concerns about widespread groundwater contamination by interim status facilities, Congress amended RCRA to provide for Loss of Interim Status (LOIS). 42 U.S.C. 6925(e)(2). The LOIS amendment required every land disposal facility granted interim status before November 8, 1984, to submit a completed Part B permit application before November 8, 1985, and to certify that it was "in compliance with applicable groundwater monitoring and financial responsibility requirements." 42 U.S.C. 6925(e)(2). Any land disposal facility that failed to meet these requirements automatically lost its interim status as of November 8, 1985, and was required to submit a closure plan to EPA within 15 days after that date and to complete closure activities within 180 days after EPA's approval of the closure plan. Pet. App. A7, A21-A22.

In July 1984, petitioners submitted a deficient Part B permit application; they also later acknowledged that they could not meet RCRA's financial responsibility requirements. Pet. 4; Pet. App. A4, A24. Accordingly, "as a matter of law," the Richland facility "lost its interim status as of November 8, 1985" pursuant to 42 U.S.C. 6925(e)(2). Pet. App. A8; see also *id.* at A24. Petitioners nevertheless continued to operate the facility without a permit for more than two years, until December 1987. They failed to submit a closure plan within the time period prescribed in RCRA, and they failed to implement the closure plan that was eventually approved by MDNR in 1988. *Id.* at A8, A24.

The district court determined that petitioners' continued operation of the Richland facility and their

failure to submit or implement a timely closure plan, among other conduct, violated several RCRA provisions. Pet. App. A2, A7-A14. In this Court, petitioners do not challenge the determination that these violations occurred. They challenge only the determination by both courts below that petitioner Ladney was jointly and severally liable with the corporate petitioners for the violations.

3. In the district court, petitioners contended that "there [wa]s no evidence that Ladney actively control[ed] MCP or play[ed] an active role in controlling the waste management policies and practices of PPP." Pet. App. A13.[3] The district court, however, held that the undisputed evidence satisfied even that standard. *Id.* at A13-A14. The court found that "Ladney [wa]s personally involved in or directly responsible for acts in violation of RCRA and HWMA," and that he "was actively involved in the day-to-day operations of PPP." *Ibid.* In so finding, the court relied on, among other evidence, deposition testimony by PPP's environmental specialist that PPP's plant manager had daily contact with Ladney, and a letter written by Ladney outlining PPP's long-term plan of operations. The court accordingly granted partial summary judgment holding petitioner Ladney "jointly liable with PPP for [the] RCRA and HWMA violations." *Id.* at A14.

In a subsequent order granting partial summary judgment in favor of respondents, the court held that respondents were entitled to permanent injunctive re-

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[3] See also petitioners' reply memorandum opposing summary judgment, stating that respondents "must prove that Michael Ladney 'actively' controlled the waste management practices of PPP to be personally liable as an 'owner' or 'operator'." C.A. App. 348 (citing *United States* v. *Northeastern Pharmaceutical & Chemical Co.*, 810 F.2d 726 (8th Cir. 1986), cert. denied, 484 U.S. 848 (1987) (*NEPACCO*)).

lief requiring petitioners to implement closure plans previously approved by MDNR. Pet. App. A28-A33. The injunction later entered by the court also required petitioners to submit for MDNR's approval a groundwater monitoring plan. *Id.* at A45; see also *id.* at A47.[4]

4. The Sixth Circuit affirmed in an unpublished opinion, adopting the findings and conclusions of the district court. Pet. App. A46-A48.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or other courts of appeal. Further review is therefore not warranted.

1. Petitioners contend (Pet. 11-23) that a corporate officer cannot be held personally liable for violations of RCRA at a corporation-owned hazardous waste facility. Petitioners did not make this argument in the district court; on the contrary, in that court they took the position that an officer could be held personally liable under a "personal involvement" standard. See p. 5 & note 3, *supra*. In accordance with circuit precedent, the Sixth Circuit declined to address the argument when it was raised for the first time on appeal. See, *e.g.*, *First National Monetary Corp.* v. *Weinberger*, 819 F.2d 1334, 1339 (6th Cir. 1987). This Court should also decline to review an argument that was neither properly preserved nor

[4] The partial summary judgments and permanent injunction affirmed below did not end this case. The district court has yet to hold a trial on the governments' claims for civil penalties against petitioners based on the statutory violations at issue here. In addition, the United States has filed a motion to enforce the terms of the permanent injunction, a matter which may be addressed at the penalty trial.

considered by the courts below. See, *e.g.*, *Patrick* v. *Burget*, 486 U.S. 94, 99 n.5 (1988); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).[5] In any event, petitioners' contention is without merit.

a. Petitioners' primary argument (Pet. 9-11, 18) is that holding corporate officers liable under RCRA would conflict with the common law principle that shields shareholders and corporate officers from liability for corporate actions. This case, however, does not present such a conflict. Petitioner Ladney's RCRA liability was based on his own conduct, not that of the corporate petitioners. The district court found that "Ladney [wa]s personally involved in or directly responsible for acts in violation of RCRA and HWMA," and that he "was actively involved in the day-to-day operations of PPP." Pet. App. A13-A14. The court of appeals adopted those findings. *Id.* at A48. No common law principles are offended when, as here, an individual corporate officer is held responsible for his own conduct. On the contrary, "[t]he general, if not universal, rule is that an officer of a corporation who takes part in the commission of a tort by the corporation is personally liable therefor." 3A W. Fletcher, *Cyclopedia of the Law of Private Corporations* § 1137 (rev. perm. ed. 1986).

In accordance with that rule, the federal courts have consistently held that individuals—not just the corporations of which they are officers, shareholders, or employees—may be subject to liability under RCRA,

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[5] In addition, this case has not yet been concluded by final judgment. The issue of petitioners' liability for civil penalties remains to be tried. The interlocutory status of this case is another factor militating against further review. See, *e.g.*, *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916).

as well as under the analogous provisions of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601 *et seq.* See, *e.g.*, *NEPACCO*, 810 F.2d at 743-745 (individual liability under RCRA, 42 U.S.C. 6973, as well as CERCLA, 42 U.S.C. 9607); *New York* v. *Shore Realty Corp.*, 759 F.2d 1032, 1052 (2d Cir. 1985) (individual liability under CERCLA, 42 U.S.C. 9607). Petitioners acknowledge the uniformity among the courts on this issue, Pet. 10-11, but maintain (Pet. 10 n.3) that *Joslyn Mfg. Co.* v. *T.L. James & Co.*, 893 F.2d 80 (5th Cir. 1990), cert. denied, 111 S. Ct. 1017 (1991), a CERCLA case, provides an exception to this line of cases. Petitioners' reliance on *Joslyn* is misplaced.

At issue in *Joslyn* was whether to "impose direct liability on parent corporations for violations of their wholly-owned subsidiaries." 893 F.2d at 81. The Fifth Circuit held that a parent cannot be held liable under CERCLA solely by virtue of its ownership of a liable subsidiary. *Id.* at 83-84. Thus, the court in *Joslyn* refused to impose vicarious liability on the parent corporation, in the absence of factors warranting piercing the corporate veil. *Id.* at 83. The court did not, however, address the quite different issue of whether a parent corporation may be held liable under CERCLA based on its *own* actions. As the First Circuit has correctly recognized, *Joslyn* is inapposite when a parent corporation is held directly liable under CERCLA "for *its* activities as an operator, not the activities of a subsidiary." *United States* v. *Kayser-Roth Corp.*, 910 F.2d 24, 27 (1990), cert. denied, 111 S. Ct. 957 (1991).

Moreover, in a case decided after *Joslyn*, the Fifth Circuit stated that "CERCLA prevents individuals from hiding behind the corporate shield when, as 'op-

erators,' they themselves actually participate in the wrongful conduct prohibited by the Act." *Riverside Market Develop. Corp.* v. *International Building Prods.*, 931 F.2d 327, 330 (citing 42 U.S.C. 9607(a)), cert. denied, 112 S. Ct. 636 (1991). Since CERCLA's "owner/operator" provisions are similar to those of RCRA, the Fifth Circuit would likely follow the other circuits in holding that an individual corporate officer may be held liable when the actions of the officer show that he or she is an "operator" within the meaning of RCRA.

b. Petitioners argue (Pet. 13-17) that the text of RCRA does not support the federal courts' uniform conclusion that officers directly involved in the commission of corporate violations may be held liable. In particular, they argue that the language of the statute compels the conclusion that for a given hazardous waste facility there can be only one "owner/operator," which in the case of a corporation-owned facility must be the corporation. They also assert that EPA regulations support their position. Petitioners are wrong on both counts.

As petitioners observe (Pet. 15), the "most basic" RCRA requirement, which petitioner Ladney was found to have violated, is set forth in 42 U.S.C. 6925(a). That provision states that "the Administrator [of EPA] shall promulgate regulations requiring each person owning or operating an existing [hazardous waste] facility * * * to have a permit." *Ibid.*[6] Petitioners argue that, since only one permit

[6] Petitioners criticize (Pet. 5, 15 n.8, 17 n.9) the district court for referring on one occasion (Pet. App. A13) to RCRA's "imminent hazard" provision, 42 U.S.C. 6973, even though this case was brought under 42 U.S.C. 6928(a)(1), which authorizes suit against "any person [who] has violated or is in violation of any requirement" of RCRA. The

is issued for each facility, Section 6925(a) implies that only one person can own or operate a facility. The text of the statute does not support that argument. Section 6925(a), by its terms, leaves to EPA the task of prescribing permit requirements. Although EPA has required a single permit for each facility (see 40 C.F.R. 270.10(b), 270.11(a)), nothing in the text of the statute would prevent EPA from requiring each owner or operator associated with a facility to obtain a permit. On the contrary, because Section 6925(a) applies to "each" person and uses the disjunctive "or" to connect the words "owning" and "operating," it expressly recognizes that a person who "owns" a facility may not be the same as a person who "operates" the facility. See also 42 U.S.C. 6925(e)(2). Thus, the text of the statute undermines petitioners' contention that for each facility there can be only one owner/operator—or, indeed, that there can be only one owner or one operator.

The regulations likewise provide no support for petitioners' contention. In accordance with the statute, EPA's regulations define "owner" and "operator" as separate terms, indicating that they may be separate entities. 40 C.F.R. 260.10. Petitioners focus on the latter definition, which defines "operator" to

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district court's reference to the imminent hazard provision may be attributable to the fact that that provision was at issue in *NEPACCO*, the decision that petitioners cited as supplying the proper standard for determining petitioner Ladney's liability. In any event, petitioners do not, and cannot, suggest any way in which the court's reference affected the court's analysis. Petitioner Ladney plainly qualifies as a "person" under Section 6928(a)(1), see 42 U.S.C. 6903(15); the question here, as in the district court, is whether he can be held liable as an "operator."

mean "the person responsible for the overall operation of a facility." *Ibid.* Petitioners argue (Pet. 13-14) that EPA's use of the article "the" in the definition precludes the agency from claiming that Mr. Ladney *and* PPP are jointly and severally liable as "operators," even if Ladney was personally "responsible for the overall operation" of the Richland facility. That argument ignores the provision in the same set of regulations stating that "[w]ords in the singular include the plural." 40 C.F.R. 260.3(b). That provision, of course, accords with the settled rule of statutory construction. 1 U.S.C. 1; *Wilson* v. *Omaha Indian Tribe*, 442 U.S. 653, 665 (1979). Thus, EPA's regulations make clear the agency's view that a facility may have more than one "operator," just as it may have more than one "owner." Because the agency's view represents, at least, a reasonable reading of the statute, EPA acted well within its discretion in adopting it. See *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837, 842-843 (1984).

Finally, the courts have consistently rejected the argument that there can be only a single liable "operator"—the corporation, not corporate officers as well—under RCRA as well as CERCLA. See, *e.g.*, *United States* v. *Conservation Chem. Co.*, 733 F. Supp. 1215, 1221 (N.D. Ind. 1989); *United States* v. *Environmental Waste Control, Inc.*, 698 F. Supp. 1422, 1428-1429 (N.D. Ind. 1988).[7] As one court reasoned in construing the analogous "owner or

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[7] The court in *Environmental Waste Control* subsequently held the president and sole shareholder of the corporation individually liable under RCRA. See *United States* v. *Environmental Waste Control, Inc.*, 710 F. Supp. 1172, 1201-1204 (N.D. Ind. 1989), aff'd on other grounds, 917 F.2d 327 (7th Cir. 1990), cert. denied, 111 S. Ct. 1621 (1991).

operator" language in Section 107 of CERCLA, 42 U.S.C. 9607:

> Congress, by including a liability category in addition to owner ("operators") connected by the conjunction "or," implied that a person who is an operator of a facility is not protected from liability by the legal structure of ownership. Given this grammatical construction and the broad definition of "person," corporate status, while relevant to determine ownership, cannot shield a person from operator liability.

Kayser-Roth, 910 F.2d at 26. That reasoning is fully applicable here. Under RCRA, 42 U.S.C. 6925(a), liability may be imposed on a person who owns *or* operates a hazardous waste facility without the required permit.

2. Petitioners contend (Pet. 23-28) that, accepting the standard of individual liability petitioners themselves endorsed below, the district court erred in granting summary judgment holding petitioner Ladney liable. That fact-bound contention does not warrant further review. The district court applied the proper standard for determining whether summary judgment was appropriate. Pet. App. A4-A5, A26-A28. Based on its own review of the record, the court of appeals adopted the district court's findings. *Id.* at A47, A48. Petitioners provide no reason why this Court should depart from its practice of declining to review findings of fact concurred in by both courts below. See, *e.g.*, *Goodman* v. *Lukens Steel Co.*, 482 U.S. 656, 665 (1987). In any event, the record amply supports the district court's conclusion that petitioner Ladney was personally responsible for the RCRA violations.

The undisputed evidence established that Ladney was (1) the president of PPP at all relevant times; (2) the person listed on the Richland facility's original RCRA Part A application as its owner and operator from August 1980 until January 1985;[8] (3) the PPP officer who personally attested to information concerning PPP's environmental cleanup efforts in a state court lawsuit brought by MDNR;[9] and (4) a hands-on corporate president who kept in close touch

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[8] Contrary to petitioners' statement, the amended Part A application substituting PPP as the facility's owner and operator was not accepted "years before the alleged violation occurred." Pet. 24 n.12. In fact, the facility lost its interim status approximately ten months after the amended application was accepted. Pet. App. A4, A8. While neither we nor the courts below regard petitioner Ladney's formal listing as owner/operator until January 1985 as dispositive by itself (see *id.* at A13), petitioner does not make—and the record would not support—any contention that the amendment to the Part A application was made because of any change in the nature of Ladney's involvement in the operation of the Richland facility.

[9] The affidavit in which Ladney attested to "firsthand knowledge" of certain cleanup and monitoring operations was originally submitted by Ladney in the state-court suit referred to in the text; a copy of the affidavit was later submitted in the present case by respondents. See C.A. App. 353. There is no basis, however, for petitioners' suggestion (Pet. 26) that the district court mistakenly believed that the affidavit was originally prepared in connection with the present case. Moreover, the district court properly treated Ladney's affidavit as probative of his knowledge and authority, since the affidavit was contemporaneous with the ongoing RCRA violations in this case and attested to Ladney's "firsthand knowledge" of sludge removal operations of the sort ultimately required by the permanent injunction below. See Pet. App. A14, A43-A45.

with PPP's operations at Richland by regular telephone contact with its plant manager.[10]

Also undisputed in this Court is that, in violation of RCRA, the Richland facility operated for more than two years without a permit; no timely closure plan for the facility was submitted; and the closure plan eventually approved by MDNR was not implemented. Despite the long-term and global nature of these violations, petitioner Ladney did not submit any evidence that he was not personally involved in keeping the facility open. Ladney did not even submit an affidavit or declaration in his own name to deny personal knowledge of or involvement in these violations.

Instead, petitioners relied on the deposition testimony of two PPP employees described as "the environmental specialists who were responsible for all of PPP's environmental compliance activities, including the activity that allegedly violated RCRA and HWMA." Pet. 27. Although neither employee testified to having direct contact with petitioner Ladney on a regular basis, they testified that they answered to the Richland plant manager, with whom petitioner was in frequent direct contact. Pet. App. A50-A51, A53-A54. Moreover, neither employee suggested that major decisions involving environmental compliance—such as operating without a permit—were or could be made without the approval of petitioner Ladney in his capacity as PPP's president.

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[10] The plant manager, William Evans, testified in his deposition that he talked with Mr. Ladney "at least once a week," and sometimes as frequently as "five times a day." C.A. App. 175. As the district court noted, Pet. App. A14, Steven D. Noble, an environmental specialist at the Richland plant, gave similar testimony at his deposition, *id.* at A50-A51.

In the face of the evidence showing that petitioner Ladney was directly responsible for the Richland facility's day-to-day operations, petitioners were obliged to come forward with "specific facts showing that there is a genuine issue for trial." *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 323-324 (1986). As the courts below correctly determined, petitioners failed to do so. Summary judgment was accordingly appropriate.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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